UNITED MALAYAN BANKING CORPORATION BHD. v. WILLIAM KOH TRADING CO. & ANOR.

[O.C.J. (Abdul Hamid J.) November 11, 1968]
[Seremban — Civil Suit No. 185 of 1967]

Practice and Procedure — Judgment in default of appearance — Application to set aside judgment — Allegation that no affidavit of service had been filed — Substituted service — Defendants living outside jurisdiction — Merits of claim — R.S.C., 1957, O. 12 r. 2 and O. 13 r. 2.

This was an application by the second defendant to set aside a judgment entered in default of appearance. It was argued (a) that as the affidavit of service had been filed by the process server and not by the plaintiff, there was no affidavit of service as required by O. 13 r. 2 of the Rules of the Supreme Court, (b) that substituted service on the partners of the first defendants was bad as the parties lived at all material times in Singapore and (c) that on the merits the second defendant had a *prima facie* defence to the claim.

Held: (1) the affidavit of service filed by the process server was a proper affidavit sufficient to allow the plaintiff to enter judgment in default of appearance under O. 13 r. 2;

(2) although an order for substituted service can be set aside when merits are disclosed, and where the court is satisfied that the defendant is not aware of the proceedings and is not evading service; there being no such evidence in this case the substituted service was a proper service, and the judgment in default a regular judgment in the circumstances;

(3) on the merits the second defendant had a *prima facie* defence to the claim and therefore the judgment against him should be set aside and he be allowed to defend.

Cases referred to:—

(1) *Ban Huat Seng Co. Ltd.* v. *Lee Poh Soo* [1967] 1 M.L.J. 145.

(2) *Deverall* v. *Grant Advertising* [1955] Ch. 111; [1954] 3 All E.R. 389; [1954] 3 W.L.R. 688, C.A.

(3) *Porter* v. *Freudenberg* [1915] 1 K.B. 857.

(4) *Sockalingam Chettiar & Ors.* v. *Somasundram Chettiar* [1941] M.L.J. 103.

(5) *Re Urquhart* (1890), 24 Q.B.D. 723.

CIVIL SUIT.

N. Ramachandran for the applicant (2nd defendant).

Dato' Balwant Singh for the respondents (plaintiffs).

Cur. Adv. Vult.

Abdul Hamid J.: This is an application by the second defendant asking for an order that a judgment signed by the plaintiffs on the 25th June, 1968 in default of appearance and of consequential proceedings be set aside. On the 18th day of October, 1967, the plaintiffs issued a specially indorsed writ for the sum of $5,607.61 being the debts owed to the plaintiffs by the first defendants on their current account together with interest thereon at 10.8% per annum from the 9th day of March, 1967. It was alleged that the second defendant guaranteed by a contract in writing dated the 4th day of August, 1961 between the plaintiffs and the second defendant to pay on demand all advances made by the plaintiffs to the first defendant including all interest commission and banking charges thereon.

The writ was served on the second defendant on the 5th January, 1968 and on the first defendant by posting a copy of the writ of summons and statement of claim together with a copy of the order on the front door of the partners of the first defendants' last known place of address on the 19th April, 1968. No appearance was entered by either defendant. The plaintiffs obtained judgment on default of appearance for the sum of $5,607.61 and costs on the 25th day of June, 1968.

On the 19th day of September, 1968, the second defendant filed this application supported by affidavit asking that the judgment be set aside on the following grounds:—

(1) that no affidavit of service has been filed by the plaintiffs as required by Order 13 rule 2 of the Rules of the Supreme Court and accordingly judgment in default of appearance was irregular;

(2) substituted service on the partners of the first defendant is bad as the said parties had at all material time lived and are still living in Singapore and therefore the judgment obtained against the first defendant as principals is also irregular;

(3) that on the merits, the second defendant has disclosed in *prima facie* defence:—

(a) that the second defendant signed as guarantor on the understanding that it was a pure formality;

(b) that the second defendant stood surety to the extent of a sum of $5,000 only;

(c) that the second defendant understood that as soon as the first defendant repaid the overdraft this surety would be cancelled and that the whole sum on the overdraft had been paid up by the first defendant at the end of the year and as such the guarantee ceased the moment the overdraft was repaid.

(d) that no appearance was entered by the second defendant as the manager of the plaintiffs informed him that no further proceedings would be taken against him.

The applicant contends that the judgment is a nullity or at least irregular for non-compliance with Order 13 rule 2 which reads:—

"Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following Rules of this Order, or under Order 15, rule 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be."

The applicant argues that to comply with Order 13 rule 2 the affidavit of service must be filed by the plaintiffs themselves and the affidavit of service filed by the process server, before judgment in default of appearance was obtained was insufficient. Counsel for the applicant cites,

the case of *Ban Huat Seng Co. Ltd.* v. *Lee Poh Soo* [1] to show that in that case the learned judge did not decide that the affidavit filed by the process server was sufficient but only dealt with the point by way of *obiter*. I am unable to accept this contention. In my opinion the learned judge considered whether there was in fact a proper affidavit of service filed in compliance with Order 13 rule 2 and he found that the affidavit of service filed by the process server before judgment in default of appearance was entered, was a proper affidavit of service in conformity with Order 67 rule 9, Order 13 rule 2 and Order 9 rule 15.

In that case Ismail Khan J. (as he then was) when dealing with this issue states — at p. 146:—

"In the High Court in England the responsibility of ensuring due service of the writ or other originating process on the defendant lies upon the plaintiff who may effect such service either by himself or, as is much more usual, by his agent. (See *White Book* 1965, volume 1, page 92). There is no official process server such as the court process server in this country. Here, although service of the writ may be effected by the plaintiff himself, in most cases, this is done through the court process server. The fee payable to effect service is $1. (See Third Schedule (Order 73) Fees in the Supreme Court — item 102). After service, the affidavit of service is then filed by the process server. No fee is however payable on the taking of such affidavit or the filing thereof — see the proviso to item 102 and item 70.

It will be seen from the writ in this suit that in addition to the fee of $10 for the writ itself, an additional fee of $1 had been paid for the service and taking and filing of the affidavit of service by the process server, the service was effected on the defendant by the court process server on 3rd January, 1959, and the affidavit of service was then filed. This affidavit is as follows:—

"I, Shaharin bin Kassan process server of the Supreme Court, Seremban, do solemnly affirm as follows:—

1. That I did on the 3rd day of January, 1959, at 9.25 o'clock in the forenoon at No. 7, Carew Street, Seremban, serve this writ of summons now produced and shown to me and marked '1' by serving a copy of this writ of summons on the defendant, Lee Poh Soo, at No. 7, Carew Street, Seremban, who admitted to me that he was the person named therein.

2. That I did afterwards on the 3rd day of January, 1959, endorse the said writ of summons marked '1' the day of the week and month of such service..

It is clear from this affidavit that all the relevant rules, *viz.* Order 67 rule 9, Order 13 rule 2, Order 9 rule 15, have been complied with and therefore a proper affidavit of service had been filed."

It is true that in that case the plaintiff himself filed an affidavit of service but his Lordship was of the view that this was redundant and also at p. 146 his Lordship states:—

"In the present case, the plaintiffs' affidavit makes such reference. It is true that in the last paragraph thereof it is stated that the plaintiffs' own affidavit may be treated as the affidavit of service, but to my mind this is a redundancy and does not detract from the position that before entering final judgment there was a proper affidavit of service."

In this case the plaintiffs themselves did not file any affidavit of service. They relied on the affidavit of service filed by the process server before judgment was entered. Counsel for the plaintiffs argued that there was no necessity for the plaintiffs' own affidavit of service. In this case, I find that the affidavit of service filed by the process server is a proper affidavit of service sufficient to allow the plaintiffs to enter judgment in default of appearance under Order 13 rule 2. I hardly think that there is any further necessity for the plaintiff's own affidavit of service to be filed.

As regards the second ground it is not clear to my mind whether the applicant meant the date the partners of the first defendant was served with substituted service or the date when the writ was issued when he states in the affidavit that "The said partners have at all material time lived and are still living in Singapore." If the applicant contends that the words "at all material time" covered not only the former but also the latter event, I find nothing in the affidavit to support this.

In considering his point I should like to refer to the object of substituted service. Under Order 10 rule 2 of the Rules of the Supreme Court:—

"The practice governing applications for substituted service in the High Court in England shall be followed in the Federation."

Under the heading "Object and Effect of Substituted Service" in the *Annual Practice* 1957 (*White Book*), it is stated:—

"I think that the object of the rule was to obviate the difficulties that the plaintiff might be exposed to by reason of a defendant's going abroad and keeping abroad, and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion in such cases to enable the court to order substituted service, and that when such substituted service is directed, it should have all the effects of personal service."

I should also like to quote the first paragraph under the heading "Substituted Service" from *Mallal's* Supreme Court Practice, p. 76 Vol. 1, which states that:—

" 'The intention which underlies all procedure with regard to substituted service is that the defendant will probably get to hear of the proceedings'. *Per* Romer L.J. in *Deverall* v. *Grant Advertising* [2] following the principle laid down in *Porter* v. *Freudenberg*.[3] So even when an order for substituted service has been made the judgment can be set aside when merits are disclosed and when the court is satisfied that the defendant was not aware of the proceedings and was not avoiding service which is tantamount to knowledge of the proceedings. *Socklingam Chettiar & Ors.* v. *Somasundram Chettiar*." [4]

And in paragraph 3, it is further stated that:—

"Although substituted service cannot be used as a means of circumventing the necessity of personal service on a defendant out of jurisdiction, it may nevertheless

be ordered in a case where the defendant was out of jurisdiction at the time of the issue of the writ if the evidence satisfies the court that he went out of the jurisdiction to evade service. *Re Urquhart.*" (5)

In this particular case the applicant's affidavit has not shown to my satisfaction that (a) the first defendants were not aware of the proceedings; and (b) that they were not evading service. I am of the opinion that the subsituted service on the first defendants were in the circumstances of this case a proper service and that judgment obtained in default of appearance of the first defendants was regular and cannot be said to be irregular merely because the applicant alleges, which is disputed, that the first defendants had at all material time lived and are still living in Singapore.

Alternatively the applicant urges the court to exercise its discretion to set aside the judgment on the grounds that the affidavit has disclosed a good defence on the merits. I have considered these grounds and two of them are, I think, without substance. I do not consider that the applicant's allegations (a) that he signed as guarantor on the understanding that it was a pure formality, and (b) that the plaintiffs' manager had informed him that no further proceeding would be taken against him and hence no appearance was entered, sufficient to induce me to set aside the judgment.

The question is whether the remaining allegations as set out in 3(b) and (c) above constitute sufficient grounds for setting aside the judgment. For myself I must confess that on the face of the conflicting allegations in the affidavit I am unable to arrive at a decision without ascertaining the full facts. The plaintiff in his affidavit denies that the first defendant had at any time repaid a said sum of $5,000 and alleges that no defence was raised by the applicant when an A.R. Registered Notice was sent to him on 18th May, 1967, demanding the said sum of $5,000. Judging from the plaintiffs' affidavit it appears clearly that although there is a denial that the first defendant ever repaid the sum of $5,000, the plaintiffs categorically admitted that the notice of demand required the payment of the sum of $5,000. In the light of the applicant's contention that he stood guarantee only for the sum of $5,000 it becomes necessary to consider whether sufficient ground exists for me to exercise my discretion and set aside the judgment. In doing so I shall give due regard to the fact that judgment was entered for the sum of $5,607.61 which, if the contention of the applicant is correct, is in excess of the sum guaranteed and for which the applicant may not be legally liable to pay.

In these circumstances it seems to me that justice would be done if the judgment is set aside and the applicant is allowed to defend.

I allow the application and set aside the judgment. Costs to the plaintiffs.

Application allowed.

Solicitors: *N. Ramachandran; Dato' Balwant Singh & Co.*

MOHAMED REPIN v. LIM YU KEE

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Winslow J.) November 28, 1968]

[Singapore — Federal Court Civil Appeal No. Y32 of 1968]

Damages — Eyes — Total blindness — Whether allowance should be made for extra-help — Consideration to be given to risk of overlapping as between heads of compensation.

Negligence — Highway — Duty of driver of motor vehicle emerging from minor road to path of traffic on a major road — Halt sign at junction.

In this case as a result of a collision between a motor van and a motor bus at the junction of Tanjong Katong Road and Dunman Road, the appellant who was riding a motor cycle was hauled down by the motor van. The learned trial judge found that the driver of the motor van was negligent and to blame for the accident, as he had failed to stop at the halt line at the junction of Dunman Road and Tanjong Katong Road and had gone into the path of traffic on a major road. Even if the driver of the bus had seen the van in Dunman Road coming towards the junction he was justified in assuming that the van would halt at the halt sign. The learned judge found that the accident was due solely to the negligence of the driver of the motor van. He awarded $84,000 as damages and in doing so rejected the submission for the plaintiff that a sum should be awarded for a servant for the plaintiff. The plaintiff appealed and the appeal was only as to quantum of damages.

Held, dismissing the appeal: (1) in the circumstances there was evidence to show that the appellant was at least partially unable to look after himself and was and would remain in need of some additional help;

(2) however, having regard to the principles regarding overlapping and having regard to the quantum of the award, the amount assessed for the additional expenses likely to be incurred in providing the appellant with some extra help should not be added to the figure awarded as the sum awarded represented a fair and reasonable compensation as a whole to the appellant for the injuries suffered by him.

Cases referred to:—

(1) *Brooks* v. *Graham* (1964) unreported English Court of Appeal case.

(2) *Tan Heng Lin & Anor.* v. *Tay Choon But* [1968] 1 M.L.J. xliii.

(3) *Fletcher* v. *Autocar and Transporters Ltd.* [1968] 3 W.L.R. 743.

In the court below *H.E. Cashin* appeared for the plaintiff, *G. Abisheganaden* for the first defendant and *Goh Heng Leong* for the 2nd and 3rd defendants. On July 26, 1968 the following judgment was delivered by —

Chua J.: The plaintiff's claim is for damages for personal injuries and loss suffered by him and caused by the negligence of the first